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No. 94-91

In The

Supreme Court of the United States

October Term, 1994

ARTHUR M. POMPONIO,

Petitioner,

v.

BOARD OF SUPERVISORS OF FAUQUIER COUNTY, VIRGINIA, PLANNING COMMISSION OF FAUQUIER COUNTY, VIRGINIA, FAUQUIER COUNTY, VIRGINIA, AND RICHARD McNEAR, PLANNING DIRECTOR OF FAUQUIER COUNTY, IN HIS OFFICIAL CAPACITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the district court's exercise of its discretion to abstain, pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), in a case where the federal claim arises solely from construction of state zoning and land use law, and there is no constitutional challenge to the validity of that law nor any other circumstance warranting a refusal to abstain.

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v.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case is a garden variety land use dispute regarding the denial of a preliminary subdivision plan submitted by Petitioner Pomponio, a real estate developer, to the

planning officials of Fauquier County, Virginia (collectively referred to herein as "Fauquier County").[1] Fauquier County maintains, and has consistently maintained throughout the series of state administrative and judicial proceedings, as well as in the federal courts below, that Pomponio's proposed subdivision plan was not in compliance with, and therefore, not approvable under the Fauquier County Zoning Ordinance and Subdivision Regulations.

Pomponio, on the other hand, alleges that Fauquier County has purposefully misconstrued the ordinance and regulations and thereby violated his federal constitutional rights under the due process and equal protection clauses. The Fourth Circuit, sitting *en banc*, held that because Pomponio's federal claim arose "solely from construction" of Virginia land use laws, presented no exceptional circumstances, and did not present any challenge to the constitutional validity of those laws, the district court properly abstained under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

A. The Local Land Use Law Issues

The principal issue concerning Pomponio's proposed subdivision plan was whether it exceeded the maximum density permitted under the Fauquier County zoning ordinance. Section 2-308 of the ordinance requires that the maximum density of a lot must be calculated based on less than the gross area in certain circumstances, such

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[1] The list of interested parties is set forth in the petition. Pet. at ii.

as where the grade on the property exceeds 25 percent or the property contains floodplain. It is undisputed that if section 2-308 applies to Pomponio's plan, the plan exceeds the allowable maximum density set forth in section 3-400 of the zoning ordinance. *See* Pet. App. at 8a-9a n.14.

Pomponio argues, however, that section 2-308 does not apply to a "minor residential development" such as his. Pet. at 4-5. Although Pomponio now claims to rely on the "express terms" of the ordinance, *id.* at 5, he does not identify those "express terms." In fact, nowhere in the "express terms" of section 2-308 or the rest of the zoning ordinance are minor residential developments exempted from the maximum density reductions. As the Board of Zoning Appeals ("BZA") concluded, "Section 2-308 of the Zoning Ordinance applies to both major and minor residential developments" and "[t]here is no provision in Section 2-308 . . . which exempts minor residential developments from the maximum density calculation requirements."[2]

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[2] The complex and technical nature of the legal dispute between the parties is illustrated by the BZA letter opinion denying Pomponio's appeal from the Zoning Administrator's denial of his plan. *See* Resp. App. at 1a. The BZA opinion sets forth 13 separate reasons for rejecting Pomponio's interpretation and concluding that Pomponio's plan was not approvable. The BZA relied upon the language of the various ordinance provisions, the relationship of those provisions to other sections of the zoning laws and subdivision regulations, the purpose and intent of the ordinance, and considerations of zoning and land use policy.

B. The State Proceedings

On June 21, 1989, Pomponio submitted his preliminary subdivision plan for review and approval by the Planning Commission of Fauquier County. Pet. App. at 5a. Thereafter, Fauquier County Planning Director Richard McNear conducted a review of the plan and wrote a memorandum outlining several problems with it, particularly its violation of the maximum density provisions of the ordinance. *Id.*

Pomponio fully argued his position on the proper interpretation of the ordinance before the Planning Commission. Pet. App. at 7a. The Commission, however, denied approval of Pomponio's plan. *Id.* In addition to finding that it violated the maximum density provisions, the Commission found that the plan contained an impermissible density transfer and that the proposed streets were shown to run across the land of others without their consent. *Id.*

In accordance with Virginia's procedures, Pomponio appealed the Commission's decision to the Board of Supervisors. Pet. App. at 7a-8a. He reargued his interpretation of the ordinance before the Board of Supervisors, and he also asserted that even if section 2-308 covered minor residential developments, its reductions had not been routinely applied to such developments in the past and should not be applied to his plan. *Id.* at 8a. The Board of Supervisors denied Pomponio's appeal, essentially adopting the reasoning of the Commission. *Id.*

Pomponio also appealed to the BZA pursuant to Va. Code Ann. § 15.1-495 (Michie Repl. Vol. 1989). Pet. App. at 8a. The BZA is an independent judicially created body

authorized to hear appeals regarding the interpretation of zoning ordinances. The BZA, while it cannot rezone property, is also authorized to grant, under certain circumstances, such variance from the literal terms of an ordinance "as will not be contrary to the public interest" and "provided that the spirit of the ordinance shall be observed . . . . " Va. Code Ann. § 15.1-495(b).

Pomponio again had a full opportunity to argue his interpretation of the ordinance before the independent judicially appointed BZA, as well as to present evidence and testimony regarding alleged prior inconsistent interpretations or applications. *See* Pet. App. at 51a-52a. The BZA, relying on its own interpretation of section 2-308 and other relevant provisions of the ordinance, denied Pomponio's appeal. Pet. App. at 9a. In addition to finding that the language of section 2-308 and other relevant provisions demonstrated that maximum density reductions applied to minor residential developments, the BZA also found that the "proposed subdivision constitutes a violation of the spirit and intent of the Zoning Ordinance." Resp. App. at 1a.

Pursuant to Va. Code Ann. §§ 15.1-475 and 15.1-497, Pomponio further appealed the adverse administrative zoning decisions in two separate actions in Virginia circuit court. Pet. App. at 9a. In addition to presenting his legal argument again, Pomponio could have asked the court to hear evidence on his appeal. Va. Code Ann. § 15.1-497. Moreover, Pomponio also brought a claim in Virginia circuit court for monetary damages under 42 U.S.C. § 1983 (1988). However, rather than pursuing these

remedies in state court, Pomponio subsequently nonsuited these state cases and brought a new action in federal court.[3]

C. The Federal Proceedings

After nonsuiting his state court lawsuits, Pomponio brought this § 1983 action in federal court. Pomponio alleged that certain local zoning officials, particularly Mr. McNear, were biased against his subdivision plan for political reasons, and that McNear's analysis of the legality of the plan was knowingly "false" and contrary to the zoning ordinance. Pet. App. at 41a-44a. Pomponio further alleged that McNear knew that his interpretation of the zoning ordinance was contrary to prior applications. *Id.* Pomponio also asserted that at least one member of the Board of Supervisors was biased, and that this bias and various *ex parte* contacts and other procedural irregularities infected the proceedings of the Planning Commission and the Board of Supervisors. *Id.* at 44a-49a. As a result, Pomponio sought damages for alleged violations of his rights to procedural and substantive due process and to equal protection under the United States Constitution. Pet. App. at 55a-58a.

Significantly, however, Pomponio did not allege any bias on the part of the BZA, nor did he claim that the BZA had knowingly misconstrued the zoning ordinance.

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[3] Virginia procedure allows a plaintiff to voluntarily "nonsuit" an action (up until a certain point in the process) without prejudice to refile within a specified time frame. Va. Code Ann. § 8.01-380 (Michie Repl. Vol. 1992).

He also did not allege any irregularities in the BZA's proceedings. On the contrary, Pomponio claimed that he was able to present "testimony and evidence . . . to the BZA [demonstrating] that McNear had knowingly misrepresented the contents of the County's records, as well as his own pattern of prior application of the ordinance." Pet. App. at 52a. Nonetheless, Pomponio concluded that the BZA's adverse decision "was clearly based not on the evidence or ordinances but on McNear's false and misleading statements and testimony." *Id.*

Fauquier County filed a motion for summary judgment with the federal district court. Before ruling on the motion, the district court held, *sua sponte*, that this was a proper case for abstention under *Burford* and a long line of Fourth Circuit authority. Pet. App. at 33a. Pomponio then appealed to the Fourth Circuit. A three judge panel reversed, holding in a brief opinion that "[a]lthough we have stated that *Burford* abstention frequently is proper when land use and zoning issues are present," abstention was inappropriate here because "as pleaded, the case involves an alleged failure to abide by state law" and therefore "[n]o coherent policy on a matter of substantial public import is presented here."[4] Pet. App. at 30a-31a. A majority of the Fourth Circuit voted to rehear the case *en banc*. Pet. App. at 23a.

Upon rehearing, the court of appeals affirmed the district court's decision to abstain. Pet. App. at 19a-20a.

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[4] The panel cited *Neufeld v. City of Baltimore*, 964 F.2d 347 (4th Cir. 1992), in support of its decision. As discussed, *infra*, *Neufeld* is distinguishable because it did not turn on a disputed issue of state law.

The court carefully reviewed Pomponio's allegations and the procedural history of the state administrative consideration of his subdivision plan. Pet. App. at 2a-10a. The court noted that "[w]hether the zoning ordinance was incorrectly construed is the central question in the case." *Id.* at 7a. Moreover, despite Pomponio's allegations that the legal interpretations of Mr. McNear and others were "false," the court noted that "the record supports no more than a difference of opinion in this garden variety zoning dispute." *Id.*

The court then turned to reviewing *Burford* abstention doctrine as developed by this Court and as applied by the Fourth Circuit in land use and zoning cases. Pet. App. at 10a-19a. The Fourth Circuit has frequently held abstention to be appropriate in such cases where "[t]he federal claims are really state law claims because it is either the zoning or land use decisions, decisional processes, or laws that are the bases for the plaintiffs' federal claims." Pet. App. at 14a; *see Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 945 F.2d 760, 763 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1477 (1992); *Meredith v. Talbot County*, 828 F.2d 228, 232 (4th Cir. 1987); *Browning-Ferris, Inc. v. Baltimore County*, 774 F.2d 77, 79 (4th Cir. 1985); *Caleb Stowe Assocs. v. County of Albemarle*, 724 F.2d 1079, 1080 (4th Cir. 1984); *Fralin & Waldron, Inc. v. City of Martinsville*, 493 F.2d 481, 483 (4th Cir. 1974). Several of these cases, particularly *Front Royal* and *Caleb Stowe*, involve allegations of intentional misinterpretation or misapplication of zoning or land use law that are essentially identical to the allegations here.

Relying on its own precedent and this Court's recent guidance on *Burford* abstention, the court of appeals concluded that abstention was appropriate here because Pomponio's federal claims stem "solely from construction" of zoning or land use law. Pet. App. at 19a. The court distinguished cases where the federal claim involves an independent challenge to the constitutional validity of the zoning or land use law, either facially or as applied. Pet. App. at 18a; *see Neufeld v. City of Baltimore*, 964 F.2d 347, 351 (4th Cir. 1992); *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989).

The two judges of the original panel[5], joined by Chief Judge Ervin, dissented. Pet. App. at 20a. The grounds of dissent were narrow. The dissent "agree[d] that *Burford* abstention frequently is proper when land use and zoning issues are present . . . . " *Id.* at 22a. The dissent apparently also agreed that abstention would have been proper had Pomponio sought relief that would have actually required approval of his subdivision plan, but believed that since Pomponio had lost his right to develop the property abstention was no longer necessary. *Id.* at 21a. The dissent did not respond to the majority's central point that Pomponio's federal claims necessarily require the federal court to construe the zoning ordinance in his favor (thereby directly conflicting with the interpretation of the BZA and other state administrative bodies).

After initially nonsuiting his two state actions, Petitioner refiled both within the time allowed under Virginia

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[5] The original panel included a district court judge sitting by designation.

law. Both state actions are still pending, but are stayed pending resolution of this federal action.

REASONS FOR DENYING THE WRIT

Contrary to Petitioner's mischaracterization, the Fourth Circuit's *en banc* opinion represents a narrow and correct application of the law of abstention, as developed in this Court's precedents, to the facts of this case. No conflict is presented, nor any novel or important issue of federal law. Petitioner's arguments merely seek to revisit issues of abstention law that have been long-settled by this Court.

A. Petitioner Has Mischaracterized the Decision of the Court of Appeals

Petitioner claims that "the Fourth Circuit . . . held that a federal court, in deference to local and state policy, must dismiss virtually all federal constitutional claims arising from local or state land use regulation." Pet. at 10. Similar broad mischaracterizations of the holding below are found throughout the petition. *See id.* at 11 (Court of appeals has adopted "a rule of virtual exclusion . . . . "); *id.* at 13 (Court of appeals has "bar[red] the lower federal courts in the circuit from considering virtually all federal claims which chance to arise from the regulation of land use by state or local authorities."). Notably, however, while describing the holding so broadly, in his entire brief Petitioner does *not once* quote from, or even cite to, the actual opinion of the Fourth Circuit.

This omission is particularly remarkable because the Fourth Circuit very clearly and distinctly set forth its holding:

> In cases in which plaintiffs' federal claims stem *solely from construction* of state or local land use or zoning law, *not involving the constitutional validity of the same and absent exceptional circumstances* not present here, the district courts should abstain under the *Burford* doctrine to avoid interference with the State's or locality's land use policy.

Pet. App. at 19a (emphasis added). Although Petitioner briefly alludes to the "exceptional circumstances" language, he completely ignores the other – and far more significant – limitations of this narrow holding.

In particular, Petitioner makes no mention of the fundamental requirement that the federal claim must arise "solely from construction" of the zoning or land use law. Again, this omission is surprising because the court of appeals devoted much of its opinion to explaining precisely why Petitioner's claims arose "solely from construction" of the ordinances in question. *See* Pet. App. at 2a-10a (demonstrating that "[t]his dispute stems from a difference of opinion about the correct interpretation of the applicable Fauquier County zoning and subdivision ordinances").

As the court of appeals noted, Petitioner's claims are premised on the allegation that local authorities, particularly Mr. McNear, "purposefully misconstrued the zoning ordinance" and "made false and misleading legal statements about the Plan." Pet. App. at 7a. The Fourth Circuit recognized, however, that these allegations do not

change the fact that "[w]hether the zoning ordinance was incorrectly construed is the central question in the case." *Id.* Moreover, the court of appeals correctly found that "[a]lthough Pomponio has used the adjective 'false' [to describe McNear's statements about the proper interpretation of the ordinance], as is at once apparent, the record supports no more than a difference of opinion in this garden variety zoning dispute." *Id.* As the court pointed out, Petitioner was able to fully present his interpretation of the ordinance to three separate decision-makers (the Planning Commission, the Board of Supervisors and the Board of Zoning Appeals), each of which rejected his interpretation and adopted an interpretation which he views as "false." *Id.* at 7a-9a. The Board of Zoning Appeals, which even Petitioner does not allege to be biased, "relied on its own interpretation of the local zoning ordinances that were at issue and gave thirteen reasons for the denial of the appeal." *Id.* at 9a. Thus, Petitioner's federal claim rests entirely on what is at best a debatable contention that local authorities misconstrued the zoning ordinance and subdivision regulations.

Notwithstanding Petitioner's mischaracterizations, the Fourth Circuit did not adopt anything approaching a "rule of virtual exclusion." Rather the court of appeals held that abstention is normally appropriate where, as here, the federal claim depends entirely on the allegation that local authorities misconstrued a land use or zoning law. The decision leaves open for adjudication in the federal courts a wide range of land use cases, including those involving a contention that the law itself, either facially or as applied, is unconstitutional or preempted by

federal law. This narrow holding was carefully and correctly applied to uphold the district court's exercise of its discretion to abstain in the circumstances of the case at bar.

B. There Is No Conflict

1. The Fourth Circuit's Holding Is Entirely Consistent with this Court's Precedents

Petitioner asserts that the decision below conflicts with this Court's holding in *New Orleans Public Service, Inc. v. Council of New Orleans*, ("*NOPSI*"), 491 U.S. 350 (1989), although the alleged conflict is apparently premised on Petitioner's mischaracterization of the decision below. *See* Pet. at 14 ("[T]he court of appeals has thus seriously misapplied the Court's cautionary holding in *NOPSI* to create a rule of mandatory abstention that requires the federal courts in this circuit to refrain from exercising federal jurisdiction in virtually any case arising from local or state land use regulation.").

Contrary to Petitioner's suggestion, the Fourth Circuit's opinion carefully analyzes, discusses and follows this Court's precedents, particularly *NOPSI*. *See* Pet. App. at 10a-14a. In *NOPSI* the Court distinguished a preemption claim of the sort before it, which is properly adjudicated in the federal forum, from a claim, such as Petitioner's, that the state agency misconstrued its own law. The Court stated:

> Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this

> sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an "essentially local problem."

NOPSI, 491 U.S. at 362 (citation omitted) (quoted at Pet. App. at 14a). By contrast, Petitioner's claim here "boils down to an assertion that his plan complied with the zoning laws, and the local authorities wrongfully disapproved his plan by misapplying the laws and by abusing their authority in the decision-making process." Pet. App. at 19a. Thus, Petitioner's claim is precisely the sort appropriate for abstention under *NOPSI*. *Id.* at 20a.

Moreover, Petitioner's federal claim is "entangled in a skein of state law that must be untangled before the federal case can proceed." *NOPSI*, 491 U.S. at 361 (quoted at Pet. App. at 13a). Even Petitioner cannot dispute that a favorable resolution of his legal argument regarding the proper interpretation of the local ordinance is the *sine qua non* of his federal claim. Assuming, as Respondents have contended throughout this litigation, that the Fauquier County authorities properly construed the local land use laws at issue, then Petitioner's claim fails by definition. Thus, as in most garden variety zoning cases, Petitioner's "federal claim cannot be untangled from the state or local zoning or land use law." Pet. App. at 17a.

Petitioner claims that the court of appeals erred by identifying an "entire class of cases," *i.e.*, land use and zoning disputes, as opposed to an individual case, "as an important aspect of local government." Pet. at 14. This Court has held, however, that *Burford* abstention is appropriate "where the 'exercise of federal review of the question in a case and in *similar cases* would be disruptive of state efforts to establish a coherent policy with respect to

a matter of substantial public concern.' " *NOPSI*, 491 U.S. at 361 (emphasis added) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). The Fourth Circuit conducted precisely this inquiry, and correctly concluded that federal review of questions regarding the interpretation of land use and zoning laws in this case and similar cases would be disruptive of state efforts to establish a coherent policy with respect to this matter of substantial public concern. *See* Pet. App. at 17a ("We can conceive of few matters of public concern more substantial than zoning and land use laws.").[6]

Petitioner also criticizes the Fourth Circuit for basing its decision to abstain on "its own perception of the relative value or importance of the constitutional protections at issue." Pet. at 21. This criticism is meritless. The Fourth Circuit's opinion makes no relative valuation of different "constitutional protections"; it does, however, contain a judgment regarding the relative federal interest in garden variety zoning cases arising solely from construction of state or local law. As the court noted:

> Virtually all of these cases, when stripped of the cloak of their federal constitutional claims, are state law cases. The federal claims are really

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[6] This view comports, of course, with decisions of this Court. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) ("I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.") (Marshall, J., dissenting).

> state law claims because it is either the zoning or land use decisions, decisional processes, or laws that are the bases for the plaintiffs' federal claims.

Pet. App. at 14a. The First Circuit has similarly noted that "[e]very appeal by a disappointed developer from an adverse ruling by a local Massachusetts planning board necessarily involves some claim that the board exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason." *Creative Environment, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.) (emphasis in original), *cert. denied*, 459 U.S. 989 (1982); *see also Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) ("If the plaintiffs can get us to review the merits of the [local planning authorities'] decision under state law, we cannot imagine what zoning dispute could not be shoehorned into federal court in this way . . . . ")

It was entirely appropriate for the Fourth Circuit, after carefully considering Petitioner's allegations, to take into account the fact that no substantial federal issue was presented.[7] Even Petitioner acknowledges that the degree of federal interest should be taken into account in deciding whether to abstain. Pet. at 15. Indeed, in *Burford* itself this Court clearly considered the likely merit of the constitutional claims presented as a factor influencing abstention. 319 U.S. at 328 ("The federal court has been called upon constantly to determine whether the Railroad

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[7] Respondents maintain, and argued to the Fourth Circuit as an alternative ground for affirmance, that Petitioner had failed to state a claim under 42 U.S.C. § 1983.

Commission has acted within the scope of statutory authority, while the important constitutional issues have, as the federal court has repeatedly said, been fairly well settled from the beginning.").

In short, the decision below is entirely consistent with and correct under the precedents of this Court.

2. There Is No Conflict Among the Circuits

Petitioner half-heartedly suggests the existence of a conflict among the circuits. *See* Pet. at 16 ("[S]everal other circuits have adopted a different view and declined to apply *Burford* in situations involving local land use regulation."). No such conflict exists.

As even Petitioner acknowledges, the holding of the Fourth Circuit below did not announce a new rule in that court, but merely restated the view that has been consistently expressed in Fourth Circuit precedent over the past 20 years. *See* Pet. at 19. None of these cases indicates the existence of a conflict with other circuits, nor do any of the cases in other circuits cited by Petitioner suggest any conflict with the Fourth Circuit. On the contrary, other courts of appeals have repeatedly held abstention to be proper in land use disputes such as that involved here. *See, e.g., Pearl Inv. Co. v. City & County of San Francisco,* 774 F.2d 1460, 1465 (9th Cir. 1985), *cert. denied,* 476 U.S. 1170 (1986); *Ahrensfeld v. Stephens,* 528 F.2d 193, 200 (7th Cir. 1975).

The cases cited by Petitioner do not involve federal claims arising "solely from construction" of land use or zoning law, and thus these cases do not conflict with the

Fourth Circuit's holding. For example, in *Izzo v. Borough of River Edge*, 843 F.2d 765 (3d Cir. 1988), the issue was whether a local zoning board's refusal to grant a variance was preempted by FCC regulation, *not* whether it was correct under state or local law. Not only was the Third Circuit's denial of abstention in that case consistent with the holding below, but the Fourth Circuit itself has refused to abstain in precisely the same circumstances. *See Neufeld v. City of Baltimore*, 964 F.2d 347, 349 (4th Cir. 1992) (absention not proper because "Neufeld did not attack the substantive basis of the Board's denial of his conditional use permit, but rather asserted that the application of the zoning ordinance as a whole was preempted by a FCC regulation"). The court of appeals below expressly distinguished *Neufeld* from the case at bar. Pet. App. at 18a.

Other cases cited by Petitioner are also distinguishable because the federal claims are not premised on an alleged misinterpretation of state or local law. *See Silverman v. Barry*, 727 F.2d 1121, 1123 n.3 (D.C. Cir. 1984) (takings and other federal claims involving constitutionality of zoning enactments, not the interpretation of those enactments); *Nasser v. City of Homewood*, 671 F.2d 432, 439-40 (11th Cir. 1982) (claim that zoning ordinance was facially arbitrary and capricious because it did not bear a substantial relationship to the health, safety and welfare of the public); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 841-42 (9th Cir. 1979) (inverse condemnation claim based on rezoning). Far from demonstrating the existence of a conflict, these authorities merely illustrate the fact that there are many federal claims involving zoning or land use issues where

abstention would not be required under the Fourth Circuit's narrow holding. Thus, contrary to Petitioner's claim, the Fourth Circuit did not adopt a rule of "virtual exclusion" and is not in conflict with precedent from this Court or other circuits.

C. Petitioner's Arguments Are Contrary to Long-Settled Law

Perhaps recognizing that no narrower formulation will suffice on the facts of this case, Petitioner urges the Court to adopt a broad and categorical rule that would forbid federal courts from ever abstaining in cases involving constitutional claims brought under 42 U.S.C. § 1983. Pet. at 17-19, 24-25. Petitioner asserts that "the federal courts do not have the authority to summarily deny a plaintiff the choice of a federal forum when the choice of such forum has been provided by Congress." *Id.* at 11.

Petitioner is obviously wrong. *Every* abstention case involves the issue of whether a federal court should decline to exercise jurisdiction that Congress has provided. Indeed, the *dissent* in *Burford* made precisely the argument that Petitioner makes here, namely, that a federal court should not decline to exercise jurisdiction (specifically diversity jurisdiction) that had been "explicitly conferred and undeviatingly maintained by Congress." *Burford*, 319 U.S. at 338 (dissent of Justice Frankfurter). The argument advanced by Petitioner would thus require the overruling of *Burford* itself.

It makes no difference that Petitioner here alleges violations of due process and equal protection. *Burford* also involved an alleged due process violation, as did

Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951). As noted in *Alabama Public Service*, Congress had explicitly provided for federal jurisdiction over such claims based on rights under the Constitution. *See* 341 U.S. at 355 (concurring opinion of Justice Frankfurter). Nonetheless, the Court held that the district court was required to abstain from exercising this jurisdiction under the principles established in *Burford*. 341 U.S. at 350.

Petitioner has provided no reason for reopening this long-settled question in the context of § 1983. Indeed, Petitioner's reliance on § 1983 is particularly misplaced since that statute does not create federal jurisdiction at all, but provides a substantive cause of action that can be enforced in either state or federal court. Moreover, as Petitioner recognizes, Pet. at 19 n. 7, federal courts have often applied *Burford* abstention in cases brought under § 1983. *See, e.g., Bethphage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239 (2d Cir. 1992); *Robert-Gay Energy Enters., Inc. v. State Corp. Comm'n*, 753 F.2d 857 (10th Cir. 1985); *Heartland Hosp. v. Stangler*, 792 F. Supp. 670 (W.D. Mo. 1992); *St. Michael Hosp. of Franciscan Sisters, Inc. v. Thompson*, 725 F. Supp. 1038 (W.D. Wis. 1989). Congress is presumably well aware of these cases, including the 20 years of Fourth Circuit precedent applying abstention in the land use and zoning context, and has not acted to restrict them.

Finally, Petitioner claims that "[i]f the *en banc* decision of [the Fourth Circuit] goes unreviewed, the various federal courts will continue to restrict access to the federal courts and in doing so effectively repeal the statutory remedy provided by 42 U.S.C. § 1983." Pet. at 25. Not

only does this hysterical overstatement totally ignore the narrow scope of the Fourth Circuit's decision (and contradict Petitioner's own claim of a "conflict"), but it overlooks the fact that even in those § 1983 cases where abstention is applied, the § 1983 claim can still be brought in state court. Indeed, Petitioner has done precisely that here.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Pomponio's Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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August 12, 1994

FAUQUIER COUNTY BOARD OF ZONING APPEALS
THIRD FLOOR - COURT AND OFFICE BUILDING
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February 2, 1990

Mr. John F. Cahill
HAZEL, THOMAS, FISKE, WEINER,
BECKHORN & HANES
P. O. Box 12001
Falls Church, Virginia 22042

RE: Appeal #32461

Dear Mr. Cahill:

As you are aware, at their February 1st meeting, the Fauquier County Board of Zoning Appeals voted to deny the appeal filed by Mr. Pomponio and affirm the interpretation of the Zoning Administrator that Section 2-308 and Section 3-400 apply to minor residential developments in general and Clover Hill preliminary plat of subdivision in particular, for the following reasons:

1. The provisions in Article 2, General Regulations, apply to all zoning districts and to both minor and major residential developments.
2. Section 2-308 of the Zoning Ordinance applies to both major and minor residential developments.
3. The existing 125 lots of record in the proposed Clover Hill subdivision were separated into three separate tracts divided by the land owned by the County.
4. The existing lots should not be treated as one for the purpose of creating a clustered subdivision.
5. The proposed subdivision constitutes a violation of the spirit and intent of the Zoning Ordinance.

6. There is no provision in Section 2-308 or 15-200 which exempts minor residential developments from the maximum density calculation requirements.

7. Footnote 1 to Section 3-400 contains a clear statement that the density shown for any zoning district does not necessarily represent the permitted density that will be allowed for any given lot and specifically refers to Section 2-308 to determine maximum density.

8. Section 3-601 requires referral to Article 2, General Regulations, for all residential districts for provisions which may qualify or supplement the zoning district use regulations set forth in Section 3-300 and Section 3-400.

9. The word "lot" as used in Section 2-308 refers to lots of record which are proposed for subdivision. Clover Hill would not be pursuing this preliminary plan unless it intended that building permits be issued for dwelling units.

10. By way of analogy, if Section 2-308 did not apply to minor residential developments, it could lead to the incongruous result that in the Warrenton service district a minor residential development of up to 100 subdivided lots could be created by right on a 100 acre pre-May 21, 1981 lot of record which contains primarily flood plain land and steep slopes.

11. The Clover Hill development proposal does not constitute a boundary line adjustment.

12. While there may be instances of inconsistent application, it is the Board's duty to render opinions on interpretations based upon the language of the Zoning Ordinance.

13. The purpose and intent of the Zoning Ordinance would not be served if the definition of minor residential development were applied in the manner sought by Clover Hill in this appeal.

If you have any questions, please give me a call.

Sincerely,

/s/ Carolyn G. Bowen
Carolyn G. Bowen
Zoning Administrator
CGB:skp

CC: Mr. Arthur N. Pomponio
Mr. Sidney Jacobson
Mr. Paul S. McCulla, Deputy County Attorney
Mr. Edward J. Finnegan
Mr. Richard E. McNear